Supreme Court, U.S.
FILED
AUG 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1978

78-339

EARL T. STEVE,

Petitioner-Appellant

v.

ROBERT WILCOX, Sheriff, Bonner County,

Respondent-Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1978

No. _____

HARRY T. STRUVE,
Petitioner-Appellee,

v.

ROBERT WILCOX, Sheriff, Bonner County,
Respondent-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Idaho, entered on February 3, 1978 (rehearing denied May 30, 1978), releasing a petitioner held in custody pursuant to an extradition demand of the State of South Dakota.

OPINIONS BELOW

The following opinions and orders are appended:

a. The opinion of the Idaho Supreme Court reversing

judgment of the District Court of the First Judicial District of the State of Idaho, Bonner County, and ordering the release of the Respondent-Appellee. *Harry T. Struve, v. Robert Wilcox, Sheriff, Bonner County*, 99 Idaho _____, 579 P.2d 1188 (1977).

b. The Order of the Idaho Supreme Court denying rehearing. *Struve v. Wilcox*, Case No. 12307.

JURISDICTION

The habeas corpus petition was presented to determine the validity of the petitioner's prerequisition detention. The judgment of the State Supreme Court was entered on February 3, 1978, and in response to a petition for rehearing, the Idaho Supreme Court entered an order denying the petition for rehearing on May 30, 1978. The notice of appeal was filed on August 24, 1978, in the Supreme Court of the State of Idaho. The statutory provision to confer jurisdiction on this Court for this appeal is 28 U.S.C. § 1257 (2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 9 L.Ed.2d 584, 83 S.Ct. 631 (1963).
>
> (Jurisdiction under 28 U.S.C. § 1257 (2) will lie when the state court holds a statute applicable to a particular set of facts as against that such application is invalid on federal grounds.)

> *Largent v. Texas*, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873 (1943).
>
> (Appeal will lie even though the state court is not explicit in overruling a timely challenge on federal grounds.)
>
> *Lawrence v. State Tax Commission*, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102 (1932).
>
> (Erroneous failure to pass on a federal constitutional objection to a state statute is treated as equivalent to a finding of validity within the meaning of 28 U.S.C. § 1257 (2), so that an appeal will lie.)

The validity of *Idaho Code* § 19-4515 is challenged for the reason that it is repugnant to the United States Constitution, Article IV, Section 2, Cl 2, and 18 U.S.C. § 3182, as construed and applied by the Supreme Court of Idaho.

QUESTION PRESENTED

Did the Idaho Supreme Court violate the extradition clause of the United States Constitution, and the facilitating provisions of 18 U.S.C. § 3182, when it construed *Idaho Code* § 19-4515 to require an independent determination by the courts of an asylum state that there is probable cause to believe a crime was committed in the demanding state?

Did the Idaho Supreme Court violate the extradition clause of the United States Constitution and the facilitating provisions of 18 U.S.C. § 3182, when it construed *Idaho*

Code § 19-4515 to require that a probable cause hearing must be conducted in the prerequisition stage of the extradition process?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Article IV, Section 2, Cl 2:

> [2.] A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

2. 18 U.S.C. § 3182:

> Fugitives from State or Territory to State, District or Territory. — Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any person District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such

> authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

3. *Idaho Code* § 19-4513:

> Arrest prior to requisition. — Whenever any person within this state shall be charged on the oath of any credible person before any judge or other magistrate of this state with the commission of any crime in any other state and with having fled from justice; or whenever complaint shall have been made before any judge or other magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and has fled therefrom and is believed to have been found in this state, the judge or magistrate shall issue a warrant directed to the sheriff of the county in which the oath or complaint is filed directing him to apprehend the person charged, wherever he may be found in this state, and bring him before the same or any other judge, court, or magistrate who may be convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit; and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

4. *Idaho Code* § 19-4515:

> Commitment to await requisition. — Bail. — If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and that he probably committed the crime, and, except in cases arising under section 19-4506, that he has fled from justice, the judge or magistrate must commit him to jail by a warrant reciting the accusation for such a time specified in the warrant as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged.

STATEMENT OF THE CASE

On April 9, 1976, three sworn complaints were filed in the County of Lake, State of South Dakota, against one Harry T. Struve (hereinafter referred to as Appellee), charging him with uttering three checks against non-existent accounts. Upon examining the complaints, a South Dakota magistrate determined that probable cause existed to believe Appellee committed the crimes charged and issued an arrest warrant. In May, 1976, Appellee was arrested in Idaho on unrelated Idaho felony check charges, which were subsequently dismissed. Routine inquiry led to the discovery of the three outstanding South Dakota complaints. On May 14, 1976, a criminal complaint for a fugitive warrant was issued against Appellee pursuant to *Idaho Code* § 19-4513. On May 19, 1976, after examining

the fugitive complaint, the Idaho magistrate issued a fugitive arrest warrant against Appellee. On the same date, Appellee was brought before a magistrate, at which time he refused to waive extradition at a court hearing. Appellee was read in court the Idaho fugitive complaint and the attached three South Dakota criminal complaints, whereupon the magistrate ordered Appellee held to await the arrival of the Idaho Governor's Requisition Warrant.

Pending the arrival of the Governor's Requisition Warrant, Appellee challenged the validity of the prerequisition warrant by a writ of habeas corpus. On May 27, 1976, the Idaho District Court denied the petition. On February 3, 1978, the Idaho Supreme Court reversed the order denying the petition for writ of habeas corpus and ordered Appellee discharged, stating: "For failure to comply with Idaho statute requiring a judicial hearing at which it must appear the petitioner is the person charged with having committed the alleged South Dakota crimes, and that *he probably committed the same*, we reverse the District Court . . . " *Struve, supra*, at p.1. (Emphasis added.) Shortly after receiving notice of the Idaho Supreme Court decision, a South Dakota court issued an order dismissing the non-existent account check complaints against Appellee. Neither the State of South Dakota nor the State of Idaho have requested withdrawal of the still pending Governor's Requisition Warrant. On May 30, 1978, Idaho Supreme Court denied a petition for rehearing filed by the State of Idaho on behalf of the Respondent-Appellant, Sheriff Wilcox.

In its Memorandum in Support of Petition for Rehearing, Appellant first set forth the federal question presently submitted for review. Appellant stated: "It is well

understood that the right of interstate extradition is a federal and not a state matter, and that the federal law and not the state law is supreme. This being the case, any state legislation which conflicts with the federal constitution is unconstitutional and void." The Idaho Supreme Court noted *Kirkland v. Preston*, 385 F.2d 670 (D.C. Cir. 1967), but failed to discuss the federal questions presented by requiring a probable cause determination by the asylum state at the prerequisition stage.

SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED

THE DECISION BELOW VIOLATES ARTICLE IV, SECTION 2, CL 2, UNITED STATES CONSTITUTION AND 18 U.S.C. § 3182, BY CONSTRUING IDAHO LAW TO REQUIRE COURTS OF AN ASYLUM STATE TO REVIEW THE DEMANDING STATE'S CHARGING DOCUMENTS TO DETERMINE WHETHER THE DEMANDING STATE HAS SHOWN ADEQUATE PROBABLE CAUSE TO CHARGE THE FUGITIVE.

THE DECISION BELOW VIOLATES ARTICLE IV, SECTION 2, CL 2, UNITED STATES CONSTITUTION AND 18 U.S.C. § 3182 BY CONSTRUING IDAHO CODE § 19-4515 TO REQUIRE A PREREQUISITION HEARING TO DETERMINE THE ADEQUACY OF THE ABOVE-STATED PROBABLE CAUSE FINDING.

The Idaho Supreme Court has ruled that an asylum state court has the right, during the prerequisition stages of an extradition, to determine whether probable cause to

believe the fugitive committed a crime in the demanding state was shown. A close reading of the Idaho Supreme Court's opinion shows that its decision reflects an understanding that Article IV, Section 2, Cl 2, United States Constitution, and the implementing statute, 18 U.S.C. § 3182, authorize a state court pursuant to *Idaho Code* § 19-4515 to require a probable cause hearing as a prerequisite to the detention of the prisoner. This finding is to occur during the prerequisition stage, prior to the issuance of the asylum state's governor's requisition warrant and prior to the issuance of the demanding state's requisition condition request and the accompanying papers which traditionally indicate a probable cause finding in the demanding state.

Appellant submits that the Idaho Supreme Court decision does not rest upon independent state grounds.

The interpretation which the Idaho Supreme Court has implicitly given Article IV, Section 2, United States Constitution, is inconsistent with the mandate of the extradition clause. Many courts have held that, in the realm of interstate extradition, Article IV, section 2, Cl 2, United States Constitution and the federal statute created pursuant to it, 62 Stat 822 (1948), 18 U.S.C. § 3182, are supreme and override contrary state statutes. *Norton v. State*, 93 Idaho 648, 470 P.2d 413 (1970),*3 cert den*, 401 U.S. 936, 91 S.Ct. 918, 28 L.Ed.2d 215 (1971); *Smith v. State of Idaho*, 373 F.2d 149 (CA 9, 1967), *cert den*, 388 U.S. 919, 87 S.Ct. 2139, 18 L.Ed.2d 1364 (1967); *In re Hunt*, 276 F.Supp. 1122 (E.D. Mich. 1967), vacated and writ discharged, 408 F.2d 1086 (CA 6, 1969), *cert den*, 396 U.S. 845, 90 S.Ct. 81, 24 L.Ed.2d 95 (1969).

Several decisions of lower federal and state courts have held that the asylum state, consistent with the extradition clause, may not look behind the demanding state's documents in order to consider federal constitutional claims raised by the fugitive. *Wise v. State*, 197 Neb. 831, 251 N.W.2d 373, 376 (1977) (speedy trial); *In re Otis Golden*, 65 Cal.App.3d 789, 135 Cal.Rptr. 512 (1977), appeal dismissed and *cert den*, sub nom, *Golden v. California*, 434 U.S. 805, 98 S.Ct. 35, 54 L.Ed.2d 63 (1977) (probable cause to arrest); *Price v. Pitchess*, 556 F.2d 926, 928 (CA 9, 1977), *cert den*, 98 S.Ct. 504 (1977) (double jeopardy, speedy trial). See also, *DeGenna v. Grasso*, 413 F.Supp. 427, 431-432 (D. Conn. 1976) affirmed, 426 U.S. 913, 96 S.Ct. 2617, 49 L.Ed.2d 368 (1976). Earlier decisions of this Court were that federal constitutional, and other related claims, may not be considered by an asylum state court in a collateral proceeding, but rather may only be tested in the courts of the demanding state once extradition has been effected. *Pearce v. Texas*, 155 U.S. 311, 15 S.Ct. 116, 39 L.Ed. 164 (1894); *Pierce v. Creecy*, 210 U.S. 387, 402, 404-405, 28 S.Ct. 714, 720, 52 L.Ed. 1113, 1120-1122 (1907); *Sweeney v. Woodall*, 344 U.S. 86, 90, 73 S.Ct. 139, 140-141, 97 L.Ed. 114, 118 (1952).

This case presents the question whether the probable cause requirement for detention enunciated in *Gerstein v. Pugh*, 420 U.S. 103, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975) applies to interstate extradition proceedings where a fugitive is held to await processing of executive warrants, or whether the constitutional requirements are satisfied by accepting the evidence of the demanding state's sworn charging complaint and judicially-issued arrest warrant, as a sufficient showing of probable cause to justify detention awaiting rendition.

This case also affords the Court an opportunity to resolve the conflict in circuit courts existing because of *Kirkland v. Preston*, 385 F.2d (D.C. Cir. 1967), which requires an asylum state to make an independent probable cause determination, and *Ierardi v. Gunter*, 528 F.2d 929 (1st Cir. 1976), which, though requiring a probable cause showing, accepts the probable cause determination made by the demanding state and reflected in its extradition papers.

This case differs from *Michigan v. Doran* (certiorari granted April 17, 1978, no. 77-1202) in that it affords this Court an opportunity to determine whether the probable cause guarantees mentioned in the above-noted cases apply at the prerequisition stage of the extradition process.

The Idaho Supreme Court's decision unduly burdens the interstate extradition process by looking behind the charging papers of the demanding state at the prerequisition stage. The rendition of fugitives is not just a matter of comity, it is a constitutional requirement. Evidence provided by proper prerequisition documents that a particular person is charged in another state should be conclusive and should afford no basis for any further inquiry into probable cause. Such questions are not rendered moot by the dismissal of the substantive action in the demanding State of South Dakota because the underlying question of the ability of an asylum state to retain a fugitive based upon the probable cause which arises out of the issuance of the demanding state's charging documents is a question which likely will persist and become further agitated by hasty dismissals of other interstate fugitives. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 21 L.Ed. 325, 89 S.Ct. 347 (1968).

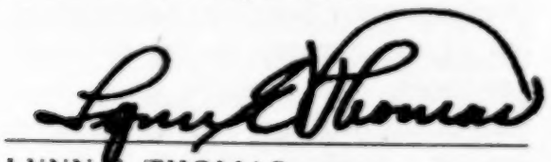
The record in the proceeding below indicates that a magistrate in the demanding state, South Dakota, had determined under the laws of the State of South Dakota that there was reasonable cause to believe that Appellee committed a crime. The Idaho Supreme Court effectively substituted its judgment on the question of probable cause for that of the South Dakota magistrate. Instead, it should have found controlling weight in the filing of charges by the State of South Dakota.

Appellant requests this Court to address the questions whether the Idaho Supreme Court had the *right* to consider the existence of probable cause to believe Appellee had committed a crime in South Dakota and whether the Idaho court was entitled to require such a showing during the reprequisition stages of the extradition process. We therefore believe that the questions presetned by this appeal are substantial and that they are of public import.

Respectfully submitted this 24th day of August, 1978.

WAYNE L. KIDWELL
Attorney General
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ARTHUR J. BERRY
Assistant Attorney General



LYNN E. THOMAS
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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF IDAHO
No. 12307

HARRY T. STRUVE, *Petitioner-Appellant,* v. ROBERT WILCOX, SHERIFF, Bonner County, *Respondent-Respondent.*	))))))	Boise May 1977 Expedited Term Filed: Feb. 3, 1978 R.H. Young, Clerk

Appeal from the District Court of the First Judicial District of the State of Idaho, Bonner County. The Honorable Dar Cogswell, District Judge.

Appeal from an order denying a petition for a writ of habeas corpus. Order *reversed* and appellant ordered discharged.

Nick M. Lamanna, Cooke & Lamanna, Priest River, for appellant.

No appearance for respondent.

BISTLINE, J.

The issue presented on this habeas corpus review is the validity of petitioner's prerequisition detention to await the issuance of an Idaho's Governor's arrest warrant on the requisition of the Governor of South Dakota. For failure to comply with the Idaho statute requiring a judicial hearing at

which it must appear that petitioner is the person charged with having committed the alleged South Dakota crimes, and that he probably committed the same, we reverse the district court with instructions to order the release of the petitioner.

Petitioner was initially arrested in Sandpoint, Idaho, on Idaho felony checkcharges.[1] A routine inquiry through the National Crime Information Center computer led to the information that South Dakota had three outstanding felony warrants against a Harry T. Struve, which were based on complaints of passing one check for $10.00 and two for $5.00, all drawn on a nonexistent bank account.

On petitioner's arraignment on the Idaho check charges, he was ordered to jail awaiting a preliminary hearing and bond was set at $1,500.00. The court then asked for and received unsworn police testimony about the South Dakota charges, in view of which the court raised petitioner's bond from $1,500.00 to $5,000.00.

Two weeks later when petitioner was taken to his preliminary hearing on the Idaho felony check charges, he was served by a Sandpoint policeman with an Idaho fugitive warrant, issued on an Idaho complaint. The scheduled preliminary was temporarily delayed in deference to an immediate court arraignment on the fugitive complaint. Petitioner's detention in jail is predicated upon the prerequisition warrant which issued

[1] Struve vigorously maintained in the district court, and here, that the Idaho check charges were a pretext, and thus tainted all that flowed from an allegedly illegal detention thereon. The trial court disagreed. Because Struve's challenged detention was not on the Idaho charges, and because we find his prerequisition detention unlawful for reasons independent of this taint theory, we mention proceedings on those Idaho check charges only where they intertwine with the proceedings in Idaho on the fugitive complaint.

following the arraignment.[2] Omitting the portions where the magistrate read from the Idaho fugitive complaint, the entire proceeding[3] was as follows:

> THE COURT: . . .
>
> This is the time that has been set for the hearing in the matter of STATE OF IDAHO, Plaintiff, vs. HARRY T. STRUVE, Defendant. Case No. 16091-F/W and STATE OF IDAHO, Plaintiff, vs. HARRY T. STRUVE, Defendant, Case No. 15967-IM.
>
> The first matter we have to take up today is 16091.
>
> Are you Mr. Harry T. Struve?
>
> MR. STRUVE: Yes sir.
>
> THE COURT: Mr. Struve, in the complaint that has been filed with the Court in this case, you are charged with being a fugitive from justice in the State of South Dakota, in violation of *Idaho Code* 19-4513. At this time, I will read the complaint to you.
>
> "Personally appeared before me this Fourteenth (14th) day of May, 1976, Charles Schoonover, in and for the County of Bonner, State of Idaho, being first duly sworn, complains and says: [Here the court read to defendant as Count I, Count II and Count III, the three South Dakota complaints, and continued.]"

[2] After petitioner was ordered to jail on the prerequisition warrant, the court turned to the matter of the preliminary hearing on the Idaho check charges. These charges were dismissed on motion of the prosecution.

[3] Case No. 16091-F/W is the Idaho fugitive complaint. Case No. 15967-IM is the earlier complaint on Idaho check charges.

This complaint was subscribed and sworn to on May 14, 1976, by Charles Schoonover before Judge Swanstrom.

At that time, Judge Swanstrom issued a warrant of arrest which was served this Nineteenth (19th) day of May and return made by Charles Schoonover. And attached to the complaint are the Three (3) complaints and warrants from South Dakota.

Now, without admitting or denying the allegations of this complaint, you understand what the charges are?

MR. STRUVE: Yes, I have a copy of the identical phrase that you read sir.

THE COURT: Now, I am going to commit you to jail for a period of time of up to Thirty (30) days to enable your arrest on a requisition from the Governor of South Dakota. So, the State of Idaho will have Thirty (30) days in which to arrest you on this requisition.

Now, in addition, at the time of this requisition, you have a right to counsel. You have a right to confront witnesses before returning to South Dakota and you have a right to produce evidence in your own behalf. Or, rather than awaiting the requisition, you have a right to waive extradition. Now, do you desire an attorney to represent you?

MR. STRUVE: Well, I was under the understanding that I was up here on this case involved here in town.

THE COURT: Well, you are here on Two (2) cases.

Now, we are talking about the extradition matter. Do you desire an attorney to represent you?

MR. STRUVE: Yes sir!

THE COURT: Do you have any money to hire an attorney to represent you? You do not?

MR. STRUVE: No sir.

THE COURT: Very well. Would you rise and be sworn please.

HARRY T. STRUVE, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION BY THE COURT FOR COURT-APPOINTED COUNSEL: [The examination disclosed that Struve was so entitled, which is not here in question.]

THE COURT: Have you signed it where it says, "Application"?

Mr. Struve, after reviewing your financial statement, I am going to appoint Mr. Nick Lamanna, the Public Defender, for Bonner County, to represent you. He will be notified and contact you. In the event you should be able to post bond in the amount of One Thousand ($1,000.00) dollars, which has previously been set by Judge Swanstrom, you should contact him at his office in Priest River.

Now, in addition, should you not desire to require the State of Idaho, or pardon me, the State of South Dakota issue a requisition through the Governor of the State of Idaho, you may waive extradition if you would like to. Now, at this time, would you prefer to wait for the requisition or would you like to waive extradition?

MR. STRUVE: I will waive extradition. I mean, I won't waive extradition.

THE COURT: You will not waive extradition. Very well then. You will be committed to the custody of the Sheriff of Bonner County for detention in the Kootenai County jail for a period of time not to exceed Thirty (30) days to await the issuance of the Governor's warrant.

Do you have any questions with regard to this matter, Mr. Struve?

MR. STRUVE: Well, uh, I don't quite understand this. I mean, uh, this has been, uh, procedure going right directly to South Dakota and what happens here? I mean, what is this?

THE COURT: This is a charge that alleges nothing more than that you are a fugitive from South Dakota. This complaint would be dismissed upon your return to South Dakota.

MR. STRUVE: You mean the charges, here, are being dropped. You mean, er, uh . . .

THE COURT: Well, in this particular case. Turning now to Case No. 15967.

The warrant[4] issued on the basis of these proceedings reads:

> The above named Defendant initially appeared in Court this date at 1:30 P.M. He was advised of his right to counsel, of his right to confront witnesses and his right to produce evidence pursuant to I.C. 19-4531. Thereafter, Mr. Nick M. Lamanna was appointed to represent HARRY T. STRUVE.
>
> Additionally, the Defendant was advised of his right to waive extradition and declined to do so.
>
> NOW, THEREFORE, the above named Defendant is committed to the custody of the Bonner County Sheriff for a period of time not to exceed Thirty (30) days to enable the arrest of the accused on a Governor's requisition pursuant to I.C. 19-4515. Bail was continued in the sum of One Thousand ($1,000.00) dollars.

The transcript of the arraignment hearing establishes that the recitations in the warrant are inaccurate in several respects. Petitioner was advised of a right to counsel only *after* he had admitted to his identity as Harry T. Struve and only *after* he was ordered to jail in lieu of bond. A right to counsel was mentioned only in connection with the right to challenge the validity of the anticipated governor's

[4] I.C. § 19-4515 provides that the magistrate's commitment to jail is

> . . . by a warrant reciting the accusation for such a time specified in the warrant as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged.

warrant.[5] Although Mr. Lamanna was appointed as counsel for such possible future hearing, he was not present at this arraignment. It is apparent from the portions of the transcript quoted above that in a matter of minutes petitioner, who was without the aid of counsel, was arrested, arraigned and committed to jail.

There appears to be no reported Idaho criminal proceeding where a habeas corpus writ was utilized to challenge prerequisition arrest and detention. Nor do we find any substantial aid in the reports from other jurisdictions. This is understandable simply because such arrest and detention is ordinarily followed by a requisition from the demanding state and the issuance of a governor's warrant in the asylum state. It is generally held that arrest under the authority of a valid governor's warrant moots any irregularities which have occurred in the prior apprehension and detention of the alleged fugitive. *Leavick v. Smedley*, 533 P.2d 482 (Alas. 1976); *McCoy v. Cronin*, 531 P.2d (Colo. 1975); *Application of Caudill*, 352 P.2d 926 (Okla.Cr. 1960). In petitioner's case we are not concerned with a situation in which a governor's warrant has been issued.[6] We have before us on review only the prerequisition

[5] I.C. § 19-4510. Rights of accused - Right to apply for writ of habeas corpus. — No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand legal counsel; and if the prisoner, his friends, or counsel shall state that he or they desire to test the legality of the arrest, the prisoner shall be taken forthwith before a judge of a court of record in this state, who shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. And when such writ is applied for, notice thereof, and of the time and place and hearing thereon, shall be given to the public prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

[6] We assume that no governor's warrant has ever been issued. Petitioner's counsel informed us at oral argument that petitioner had not yet been arrested

warrant, which was the sole basis of petitioner's detention at the time of the habeas corpus hearing in the district court.[7]

When the Idaho legislature in 1927 adopted the Uniform Extradition Act it recognized that it would be unfair to detain a person for any extended period without there being a judicial finding of probable cause for doing so.

(n. 6)
on a governor's warrant, notwithstanding that his detention on the prerequisition warrant then lacked but one week of a full year. We question the justification for his continued confinement since he was committed for a period of time not to exceed 30 days. It is true that, under the authority of I.C. § 19-4517, the magistrate may enter an order recommitting him "to a further day." However, the record shows no second commitment order. Unfortunately, our review must be of the record which was made before the district court at the time of the hearing on the writ of habeas corpus. This hearing was held on the 8th day of the 30-day detention period ordered by the magistrate.

[7] At the conclusion of the habeas corpus hearing, the deputy prosecuting attorney stated: "The only thing before the Court today is the fugitive complaint and warrant that Mr. Struve is being held on, out of South Dakota." While petitioner's counsel primarily argued the "pretext" arrest on local charges, *supra* note 1, he did refer to "this type of hearing ordered under Chapter 45 under the Extradition Act," going on to challenge the establishing of probable cause:

> As a matter of fact, your Honor, I even question the Complaint and I will ask the Court to take judicial notice of South Dakota law Chapter 23, which deals with the issuance of a Complaint and I would propose to the Court that those Complaints are not only illegal and unrecognized, but they are not sufficient under the Uniform Extradition Act and the law regarding fugitives, both under the Uniform Federal Act and Idaho's Pattern Act.

At the habeas corpus hearing there was no transcript of the proceedings before the magistrate on the arraignment on the fugitive warrant. There was a tape recording of that proceeding, but the record is clear that it was not listened to by the trial court prior to reaching a decision denying relief. Had the trial court had a transcript, as does this Court, we have no doubt that it would have reached the same view as we do on the validity of the prerequisition warrant.

The trial court did see the prerequisition warrant itself. This may have caused the court to infer that there had been a probable cause hearing, when there had not, and that petitioner had been advised of his right to counsel, when he had not, and that he had been advised that he had a right to confront witnesses and produce evidence, when he had not.

Accordingly, the Idaho version of the Extradition Act provides that a person arrested as a fugitive is entitled to have his answer to the fugitive complaint heard at a judicial examination as to the existence of probable cause:

> 19-4515. Commitment to await requisition — Bail. — If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged *and that he probably committed the crime*, and, except in cases arising under section 19-4506, that he has fled from justice, the judge or magistrate must commit him to jail by a warrant reciting the accusation for such a time specified in the warrant as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged. (Emphasis supplied.)

Under the plain provision of this statute, the magistrate was required to conduct a hearing. A prerequisition warrant committing petitioner to jail could not issue without a judicial finding that petitioner was the identical person charged with felony check offenses in South Dakota, and that petitioner probably committed the crime, and that petitioner fled from South Dakota justice. Except that there may be in this world more than one Harry T. Struve, the magistrate did establish that petitioner was indeed a Harry T. Struve.[8] Nothing in the brief arraignment accorded

[8] The procedure by which this information was obtained is suspect where petitioner was not informed of his right to, nor did he have counsel, at the time he was asked the possibily incriminating question about who he was. I.C. §§ 19-801, 802, 851, 852 and 853.

petitioner rose to the dignity of a hearing, or established the requisite probable cause which is absolutely essential to a valid order committing petitioner to jail.

The only thing in the record to which we can turn is the Idaho fugitive complaint itself, which has attached to it the three certified copies of the South Dakota complaints against a person named Harry T. Struve.[9] The criminal complaint for a fugitive warrant, while sworn to by a local officer, made no allegation that petitioner had committed any offense in South Dakota. It did allege the filing of three criminal actions in South Dakota; it did name a Harry T. Struve as the alleged offender; it did allege that that Harry T. Struve was a fugitive; and "for further particulars" it made reference to the attached certified copies of the South Dakota complaints. Each such complaint is sworn to before a notary public, W.M. Kleibacker, and charges a Harry T. Struve in the very language of the South Dakota statute, S.D.C.L. 22-41-1.2, the essential ingredients of which are a no-account check made or delivered with an intent to defraud. One such complaint, signed by a Edwin M. Swanson, is illustrative of all three:

> Edwin M. Swanson of said County, being first duly sworn and examined on oath, by the undersigned W.M. Kleibacker, a Notary Public in and for the County of Lake and State of South Dakota, on his

[9] Copies of the South Dakota arrest warrants were also attached to the Idaho complaint. These documents do not fulfill the requirement of the Idaho statute that an Idaho court is required to make its own determination of probable cause. Moreover, the inference to be drawn from the fact that the complaints were each subscribed to in front of a notary public – not a magistrate – is that the complainants never appeared before the magistrate at all. We also observe that two of the warrants were issued not by a magistrate, but by a "deputy." A perusal of the South Dakota laws does not show the position of "deputy magistrate."

> oath, complains and charges that on the 20th day of March, A.D. 1976, at Madison in the County of Lake, and State of South Dakota, Harry T. Struve did, then and there, willfully, intentionally, unlawfully, for himself, for present consideration, with intent to defraud, make, draw, utter or deliver to Casey Drug & Jewelry, Madison, South Dakota, a check, draft or order for the payment of money in the sum of $5.00, drawn upon and payble at Western State Bank, Sioux Falls, South Dakota, knowing at the time of such making, drawing, uttering or delivering that he did not have an account with such bank, in violation of SDCL 22-41-1.2, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of South Dakota, . . .

All three of the South Dakota complaints are devoid of any statement of underlying facts. Maureen Williams, who signed one, and Edwin M. Swanson, who signed the other two, are unidentified. Nothing whatever is set forth as to the transactions in which the checks were delivered and accepted. Nothing shows the sources of the complainants' information, either as to the transaction, or as to whether Harry T. Struve had a bank account.

This Idaho complaint with its attached copies of the South Dakota complaints is inadequate to justify any finding of probable cause.[10]

We need not look beyond our own statutory provisions

[10] Neither the recitals of the prerequisition warrant nor the transcript of the actual proceedings suggest that the magistrate considered himself required to conduct a probable cause hearing required by I.C. § 19-4515. Nevertheless, we have reviewed what was before him on the bare possibility he may have made an entirely subjective and unrecorded determination that he could find probable cause from the papers in front of him.

and our own case law to ascertain what is necessary to make a finding of probable cause. "Probable cause" is no stranger to Idaho criminal jurisprudence. Where an offence is one which allegedly took place in Idaho, it has ever been the law that an arrest warrant will only be issued by a magistrate upon his being satisfied that there is probable cause (reasonable ground) to believe that the named defendant has committed the offense complained of.[11] The magistrate

[11] Since the passage of Idaho's first territorial criminal code in 1864, our statutes have required a judicial officer's finding of probable cause as essential to effect a seizure of a person or his property without violating the United States Constitution, Fourth Amendment, and the Idaho Constitution, art. 1, § 17. I.C. §§ 19-505 and 506 govern warrants of arrest and provide:

> 19-505. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant.
>
> 19-506. If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest.

I.C. §§ 19-4403, 4404, 4405 and 4406 govern search warrants and provide

> 19-4403. A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.
>
> 19-4404. The magistrate must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.
>
> 19-4405. The depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.
>
> 19-4406. If the magistrate is thereupon satisfied of the existence of the grounds of the applicatin, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

must satisfy himself of probable cause from "facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant." I.C. §§ 19-505 and 506.

Long before *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Spinelli v. United STates*, 393 U.S. 410 (1969); *United States v. Ventresca*, 380 U.S. 102 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Giordenello v. United STates*, 357 U.S. 482 (1958); *Brinegar v. United STates*, 338 U.S. 160 (1949), and *Johnson v. United States*, 334 U.S. 699 (1948), this Court, in the same year that the Idaho legislature improved the Uniform Extradition Act by adding to Section 15 the safeguard of a probable cause hearing, handed down the landmark decision of *State v. Arregui*, 44 Idaho 43, 254 P. 788, 52 A.L.R. 463 (1927). In *Arregui* a conviction based upon evidence seized under the purported authority of a search warrant was reversed for the lack of probable cause justifying the issuance of a warrant. In that case it was made clear that conclusory statements will not suffice. To justify a finding of probable cause the affiant must disclose some personal knowledge of the underlying facts and set them forth, and "conclusions must be drawn by the magistrate and not by the affiant." *Id.* at 63.

> It is not necessary that the facts be sufficient upon which to base a verdict of a jury, but they must be sufficient upon which to find probable cause for the issuance of the warrant (that crime is being committed). *Id.* [12]

[12] In *Gerstein*, the United States Supreme Court stated that "both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common law antecedents." 420 U.S. at 111, 95 S.Ct. at 861.

This Court 45 years later, in promulgating Rules of Criminal Practice and Procedure, incorporated the spirit and intent of I.C. § 19-505 and § 19-506 (note 11 *supra*) into Rule 4, which requires a finding of probable cause before a requested arrest warrant may issue. What will justify a finding of probable cause is succinctly but clearly set forth:

> Rule 4. Warrant or summons upon complaint. (a) . . . The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished . . .

Rule 4(a) provides for the situation where a magistrate may be in doubt as to the sufficiency of what has been laid before him:

> . . . Before ruling on a request for a warrant, the magistrate may require the complainant to appear personally and may examine under oath the complainant and any witness he may produce. . . .

(n. 12)
Gerstein concluded that ". . . the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." 420 U.S. at 114, 95 S.Ct. at 861. And,

> Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest. 420 U.S. at 125, 95 S.Ct. at 868.

The Idaho legislature, in the area of prerequisition detention, afforded that constitutional safeguard, I.C. § 19-4515, 47 years before *Gerstein*. This Court at that same early time drew the distinction between reasonable doubt as to guilt and probable cause where seizure of a person or his property was concerned. *Gerstein, supra*, 420 U.S. at 119, 95 S.Ct. at 866; *Arregui*, 44 Idaho at 63.

On a warrantless arrest, according to Rule 5(d), the magistrate is directed to discharge a defendant where the probable cause determination made after the arrest fails to justify the arresting officer's determination of probable cause.

Considering then that a person arrested either with or without a warrant, as a fugitive from the justice of another state, may be detained *indefinitely* under the provisions of our prerequisition detention statutes, and that such a person is not a candidate for either a preliminary hearing or for a speedy trial in Idaho, the wisdom of the legislature in affording such a person the safeguard of a probable cause hearing, I.C. § 19-4515, must be applauded. The philosophy evident in this statute was also reflected in our recent decision in *Walton v. State*, 98 Idaho 442, 566 P.2d 765 (1977). There, in reviewing a habeas corpus proceeding testing the validity of extradition on a governor's warrant, this Court said:

> While the courts of the asylum state are obligated to prevent the state from becoming a haven for fugitives from other states, the authority of the state to protect its citizens from illegal arrest or wrongful rendition must never be forgotten. 98 Idaho at 444.

It may be noted that in governor's rendition proceedings, the courts of asylum states in several jurisdictions have accorded defendants the protection of the Fourth Amendment to United States Constitution by requiring that the extradition documents of the demanding state establish probable cause. Where the extradition documents consist merely of affidavits and/or criminal complaints the underlying facts must be set forth. *Kirkland v. Preston*, 385

F.2d 670 (D.C. Cir. 1967); *Pippen v. Leach*, 534 P.2d 1193 (Colo. 1975); *People v. Doran*, 258 N.W.2d 406 (Mich. 1977); *Sheriff v. Thompson*, 452 P.2d 911 (Nev. 1969).

The *Kirkland* court, in holding that a "Section 3182 affidavit must present facts sufficient to establish a showing of probable cause under the federal Fourth Amendment standards,"[13] made this cogent observation:

> For apprehension of a fugitive under Section 3182 is plainly a criminal arrest since it deprives him of his liberty for the purpose of insuring his presence at a criminal trial. 385 F.2d at 676.

The court went on to explain in depth the rationale for its decision.

> The law appreciates the hardship which extradition can involve: not only the suspension of one's libery, but his deportation from the state in which he lives into another jurisdiction which may be hundreds of miles from his home. [Footnote omitted.] The law accordingly surrounds the accused with considerable procedural protection to stave off wrongful rendition. [Footnote omitted.] It is consistent with this concern for the accused's just treatment to recognize his right to require official confirmation of probable cause in the asylum state before extradition. This right to probable cause confirmation seems especially appropriate in view of the fact that the accused will have no access to

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[13] The court there was referring to the Federal Rendition Act, U.S.C. § 3182, which governs extradition requirements where the demanding state governor presents to the asylum state governor "a copy of an indictment found or an affidavit made before a magistrate."

an evidentiary preliminary hearing on probable cause unti he finally arrives in the accusing jurisdiction. [Footnote omitted.]

In addition, the interests of the asylum state are advanced by its own probable cause determination. For it would be highhanded to compel that jurisdiction to lend its coercive authority, and the processes of its law, against even its own citizens in aid of an enterprise the key details of which remain in the dark. If, as here, it turns out that the prosecution against the fugitive is unfounded, [footnote omitted] the asylum state will have expended its resources and given the legitimizing stamp of its judiciary to a cause which is at best futile, at worst arbitrary.

Recognizing a probable cause requirement in Section 3182, moreover, conflicts with no compelling interests elsewhere in the legal system. If the demanding state does have probable cause data, it will be no real inconvenience to record this evidence in the extradition papers. Documenting probable cause in an affidavit is what the policeman in many jurisdictions, including the District of Columbia, must do if he is to secure an ordinary warrant for an arrest or search. And governors, or *habeas corpus* judges, will hardly be significantly burdened by having to study written submissions for probable cause in extradition cases. [Footnote omitted.] 385 F.2d at 677.

Where it is thus seen that arrest under a governor's warrant is such a significant interference with a person's freedom as to necessitate a showing of probable cause, it is only logical that we require strict adherence to our statutory

requirement that probable cause be established as a condition precedent to prerequisition detention awaiting the probability that a governor's warrant will be issued.

What was said in *Kirkland* is equally true here, establishing probable cause at the hearing mandated by our statute, I.C. § 19-4515, is no real inconvenience. In this day of instant communication and rapid transportation, the identify of petitioner as the Harry T. Struve who allegedly passed bad checks in South Dakota could have easily been established. Also, how much effort would have been entailed in establishing the identity of Maureen Williams and Edwin M. Swanson, and briefly outlining their firsthand knowledge of the underlying facts which gave rise to the complaint? What problem would there have been in obtaining an affidavit from the bank stating that it had no account in the name of Harry T. Struve? Surely the two merchants (if that is not who Williams and Swanson are) who received the worthless checks (two for $5.00 and one for $10.00) would have, on request, stated a brief resume of the transactions. But, nothing like this was done. Instead we see nothing but the bare allegations of the criminal complaints, mirroring the language of the check statute. The complaints did not make a showing of probable cause such as will justify the detention of petitioner.

One other point needs to be addressed and that is the matter of petitioner's right to counsel at the time of his arraignment on the fugitive warrant. It is not easy to understand why the magistrate informed petitioner that he would be entitled to counsel when he was arrested on a governor's warrant, and yet did not inquire as to whether petitioner desired counsel at that time when the magistrate was preparing to detain him. In Idaho, any person so

detained has a right to counsel. It would indeed be an anomaly to allow a person counsel in challenging his arrest on a governor's warrant, but not in making his answer to a fugitive complaint at a proceeding which can lead to his indefinite incarceration in a county jail. The fact that the Idaho peace officer making the complaints alleges that a person has committed a public offense in another jurisdiction, and is a fugitive therefrom, does not make it any less a complaint of "a public offense" within the meaning of I.C. § 19-801, which provides that the accused person must be informed of his right to counsel. I.C. § 19-802 provides that a reasonable time be afforded for securing counsel, and I.C. § 19-852 sets forth circumstances under which counsel will be provided for a needy person. Perhaps, had petitioner been represented, a real probable cause hearing would have taken place.

For the reasons stated above, we reverse the trial court decision denying petitioner his discharge from custody. The district court is authorized and directed to forthwith, upon receipt of this opinion,[14] enter an order discharging the petitioner from any custody which ensued from the prerequisition warrant of May 19, 1976, and from any

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[14] In all proceedings below the State was represented by the City Attorney of Sandpoint, Idaho, acting in that capacity and sometimes as Deputy Prosecuting Attorney. He did not file a brief, or appear to argue, preadvising this Court that such was his intention, and his advice showed that a copy of that advice was sent to the office of the Attorney General, on whose part also there was neither brief filed nor appearance for oral argument. Whether it was thought that the appeal was so lacking in merit as to be not dignified by a brief or appearance on behalf of the respondent, or whether it was thought that it was impossible to sustain the issuance of the prerequisition warrant, in either event this Court was entitled to the benefit of an adversary presentation. The office of the Attorney General has on many occasions presented matters in briefs, and at arguments, which, though helpful to a defendant, greatly aided this Court in its endeavors to conduct a fair and just appellate review.

subsequent renewals of that prerequisition warrant founded on no more than the record which was before the magistrate on the date that the warrant first issued.

Reversed with directions. Order to accompany opinion.

BAKES, J., and DUNLAP, D.J. (ret.), concur; DONALDSON, J., concurs in result; SHEPARD, C.J., dissents without opinion.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF IDAHO

HARRY T. STRUVE,
Petitioner-Appellant,
v.
ROBERT WILCOX, SHERIFF,
Bonner County,
Respondent-Respondent.

Case No. 12307
May 30, 1978

ON PETITION FOR REHEARING

BISTLINE, J.

The State of Idaho, through the office of the Attorney General, though not a party to nor participant on this appeal, has asked for a rehearing.

As an excuse for not having participated in the appeal, the State points to office error in having initially viewed the habeas corpus proceeding against Sheriff Wilcox as being civil in nature.

The State wants the cause reheard in order to urge upon us that the issuance of a governor's warrant renders moot irregularities in prerequisition arrest and detention. Our opinion of February 3, 1978, might have sufficed to show our own knowledge in that regard, and therein we wondered why Struve had not been processed under a governor's warrant.

In its petition, the State attaches a copy of a governor's warrant which issued on the 2d day of June, 1976, and a sheriff's return showing that a copy of the same was served upon Struve. The return, in all respects similar to a return of civil process, does not show or suggest that Struve was arrested pursuant to the warrant. The petition does not suggest that Struve, if arrested, was taken before a magistrate as required by both state and federal statutes. Nor does the petition claim that the State of South Dakota continues to want Struve returned.

The petition for rehearing is denied.

DONALDSON and BAKES, JJ., and DUNLAP, J. (pro tem), concur.

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF IDAHO

HARRY T. STRUVE, *Petitioner-Appellant,* vs. ROBERT WILCOX, Sheriff, Bonner County, Idaho, *Respondent-Respondent.*	Case No. 12307 Notice of Appeal to the Supreme Court of the United States Filed Aug. 24, 1978

NOTICE IS HEREBY GIVEN That Robert Wilcox, Sheriff, Bonner County, Idaho, the Respondent above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Idaho entered on February 3, 1978, granting the Writ of Habeas Corpus releasing the petitioner. The Order of the court denying the petition for rehearing was entered on May 30, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED this 24th day of August, 1978.

WAYNE L. KIDWELL
Attorney General
State of Idaho

LYNN E. THOMAS
Deputy Attorney General

ARTHUR J. BERRY
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 1978, I served a true and correct copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES by placing the same in the United States mails, postage prepaid, and addressed as follows: Clerk of the Court, Idaho Supreme Court, 455 W. State Street, Boise, ID 83702; and to Nick M. Lamanna, COOKE & LAMANNA, P.O. Box 789, Priest River, Idaho 83856.

DATED this 24th day of August, 1978.

ARTHUR J. BERRY
Assistant Attorney General